



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 22, 1994

Ms. Alesia L. Sanchez
Legal Assistant
Legal Services, MC110-1A
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78711-9104

OR94-737

Dear Ms. Sanchez:

You have asked whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 25782.

The Texas Department of Insurance (the "department") received a request for information concerning an individual licensed by the department. The department has submitted to this office for review various marked documents. You contend that these documents may be withheld from public disclosure pursuant to section 552.103(a) and 552.111 of the Government Code. We will address your arguments.

The department has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated in a judicial or quasi-judicial proceeding and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. A governmental entity must meet both prongs of this test for information to be excepted under 552.103(a).

You contend that litigation over a matter involving an individual licensed by the department is reasonably anticipated. A governmental body must demonstrate that litigation is reasonably anticipated and the requested records are related to that anticipated litigation. In Open Records Decision No. 452 (1986) at 4, this office stated:

Litigation cannot be regarded as "reasonably anticipated" unless there is more than a "mere chance" of it -- unless, in other words, we have concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. [Citations omitted.]

You have not presented facts that indicate litigation is reasonably anticipated. Our review of the "representative samples" of documents you sent do not indicate, as you contend, that there is "an ongoing investigation of the above-referenced person for alleged violations of state insurance laws." The file documents you submitted indicate that one matter was resolved without litigation and that the individual's licensing status at the time the request was received was "administrative review." Since the department has not provided sufficient information to show that litigation is reasonably anticipated, it has not met its burden under section 552.103(a).

We note also that one of the documents you sought to withhold from disclosure under 552.103(a) was written by the person who would be the opposing party in litigation. Once all parties to anticipated litigation have had access to or seen the information at issue, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349, 320 (1982). Therefore, you could not have withheld from the file this document or others that the opposing party had seen even if section 552.103(a) had been applicable.

You contend that some of the documents are excepted from disclosure under section 552.111. Section 552.111 excepts from public disclosure an "interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." The proper scope and interpretation of this section were addressed by this office in Open Records Decision No. 615 (1993), in light of the holding in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ). This office stated:

We conclude that [section 552.111] excepts from disclosure only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the deliberative or policymaking processes of the governmental body at issue. . . . [W]e stress that in order to come within the [section 552.111] exception, information must be related to the *policymaking* functions of the governmental body. An agency's policymaking functions do not encompass routine internal administrative and personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues.

Open Records Decision No. 615 at 5 (emphasis in original).

We agree that some sections of the documents at issue are excepted from disclosure under section 552.111.¹ We have marked the portions of the documents that may be withheld under section 552.111. The rest of the documents must be released. We also note that the department has the discretion to release information that is excepted under section 552.111. Open Records Decision No. 470 (1987) at 2-3. We are resolving this matter with an informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Government Section

RHS/KHG/rho

Ref.: ID# 25782

Enclosures: Marked documents

cc: Ms. Amy R. Castañeda
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1717 Main Street
Dallas, Texas 75201
(w/o enclosures)

¹In reaching our conclusion here, we assume that the "representative sample" of the documents at issue that were submitted to this office are truly representative of the requested records as a whole. See Open Records Decision No. 499, 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open records does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.